Brief and Argument in Support of Petition for Writ of Certiorari.

First, Second and Third Propositions.

In support of our First, Second and Third Propositions to the effect that this suit constituted a collateral attack upon the judgment of the Probate Court ordering a sale of the property in question, and order of the Court confirming the sale, and the order approving the final account and discharge of the administrators, we desire first to call the Court's attention to the following facts.

(a) The Southwestern Life Insurance Company held a mortgage lien against the building in controversy, and in due course and exercising its proper legal authority, it foreclosed its mortgage lien and the property was bought in by the Southwestern Life Insurance Company in satisfaction of its indebtedness against the property, The Southwestern Life Insurance Company obtaining from the foreclosure sale a complete legal and equitable title to the property.

(b) That the administrators were finally discharged and a proper order of the Probate Court was entered attesting that fact.

(c) That thereafter, at a time when there was no trust relationship existing between the administrators, George Strates and J. L. Dimotsis, and the heirs, Mrs. Eugenia Dimotsis and the minor children, the said George Strates and J. L. Dimotsis pur-

chased the property in controversy from its legal owner, the Southwestern Life Insurance Company. This suit is to impress a trust in favor of Eugenia Dimotsis and the minor children upon the property thus purchased.

Before a constructive trust can be placed upon a transaction occurring wholly after the trust relationship had expired and without any connection with the former trust relationship, without proof of a satisfactory character that the discharge was fraudulent, the presumption is that public officers and administrators do as the law and their duty requires them.

In order to constitute a constructive trust, it is necessary for one who is clothed with fiduciary character, by fraud or otherwise, to gain some advantage to himself. In this case George Strates and J. L. Dimotsis were not clothed with fiduciary character nor did they practice any fraud in the purchase of the property. The fraud found by the trial Judge to have existed, by his own statements in the opinion, were conclusions reached from inference derived from letters and other acts, none of which were complete within themselves. Whereas it was the duty of the court in weighing the testimony, to presume the good faith of George Strates and J. L. Dimotsis, and the validity of the orders of the Probate Court.

The further fact that the trial court held that the property in question had a value of $70,000.00, whereas the Probate Court had held that $60,000.00 was a reasonable and fair value of the property, it necessarily follows that the finding of the trial court

in this cause constituted a collateral attack upon the judgment of the probate court.

Authorities.

The authorities sustaining this contention are:

Ebberts v. McLean, 98 S. W. (2d) 352;
Gabert vs. Olcott, 86 Tex. 121, 23 S. W. 985;
Revised Civil Statutes, Art. 3584.

For the convenience of the Court Art. 3584 is copied here.

"After the expiration of five days from the filing of a report of sale, the county judge at a regular term of his court, shall inquire into the manner in which the sale was made, and hear evidence in support of or against such report; and if satisfied that the sale was fairly made, and in conformity with law, he shall enter upon the minutes a decree confirming such sale, and order the report of sale to be recorded by the clerk, and a conveyance of the property to be made by the executor or administrator to the purchaser upon compliance with the terms of sale. If the court is not satisfied that the sale was fairly made and in conformity with law, an order shall be entered upon the minutes setting the same aside and ordering a new sale to be made if necessary."

Erie Railway Co. vs. Tompkins, 304 U. S. 64-92;
Ruhlin vs. N. Y. Life Ins. Co., 304 U. S. 202-209;
McGrady vs. Clary, 247 S. W. 1099;
Moore vs. Wooten (Sup. Ct.), 280 S. W. 743;
Crawford vs. McDonald (Sup. Ct.), 88 Tex. 626, 33 S. W. 325;
Askey vs. Power, 94 S. W. (2d) 136;
Dansby vs. Stroud, 48 S. W. (2d) 1018;
Dignowity vs. Baumblatt, 85 S. W. 834.

In the case of *McGrady vs. Cleary, supra,* (writ dismissed by the Supreme Court), we call attention to the fact that the effect of the dismissal of the application for the writ of error was to make the law involved in this case the holding of the Supreme Court, and we quote as follows from the opinion:

"We are not informed by the record as to why the court ordered all of the Motley County ranch to be sold. That was a matter peculiarly within the jurisdiction of the Probate Judge, and he alone could decide it. He was empowered to call in witnesses and fully investigate and make this order, and we must presume that *he ascertained its value,* its marketability, and that he took into consideration the effect of a sale of a portion upon the value of what would be left. In any event, the appellant has not directly sought to attack the validity of this order. After citing a number of authorities, appellants concede that the probate court, being one of general jurisdiction in matters relating to estates, its confirmation in this case of the sale of more property than was required to pay the debts and claims is at most merely voidable. It is further conceded that the District Court of Motley County is without jurisdiction to review or set aside the orders of the county court of Childress County, unless such orders are absolutely void (Heath v. Layne, 62 Tex. 694), and that the action of the Probate Court cannot be collaterally attacked in this suit, but must be set aside, if at all, by proceedings commenced in the court and the county where the administration is granted."

From the opinion of the Supreme Court of Texas in the case of *Askey vs. Power, supra,* we quote the following:

"Had a conveyance of the 100 acres been made as a part of a fraudulent transaction, it would have been necessary for the plaintiffs to have set it aside as a prerequisite to have the 100 acres again sold, and while the District Court has general jurisdiction, to set aside a sale fraudulently made by an administrator, it must do so in a suit filed directly for that purpose and not by way of collateral attack upon the sale." Citing Gillenwater et ux v. Scott, 62 Tex. 670. "The present suit is in the nature of a collateral attack upon the orders of the County Court that have become final." Citing Crawford v. McDonald, 88 Tex. 626, 36 S. W. 325; Redmond v. Crowley, 123 Tex. 315, 41 S. W. (2d) 270, 70 S. W. (2d) 1113.

Fourth Proposition.

Under our Fourth Proposition of law we direct attention to the fact that the trial court held that the estate of George Dimotsis, deceased, the original owner of the property in controversy, was insolvent. Therefore, under the law of the State of Texas as interpreted by its courts the heirs of George Dimotsis, deceased, cannot maintain this cause of action unless it is shown there are no unpaid creditors of the estate, because if there are approved creditors of the estate they are necessary parties to the suit.

Authorities.

This proposition is sustained by the following authorities:

Northcraft vs. Oliver, 74 Tex. 162, 11 S. W. 1121;
Beddings vs. Steele, 28 Tex. 733;
Peveler vs. Peveler, 54 Tex. 53;

Herbert vs. Harbert, 59 S. W. 594.

From the case of *Beddings vs. Steele, supra,* we quote the following:

"When there are creditors or an administrator of the estate, the heirs should not be permitted to sue for the recovery of property of the estate *in their own right,* and hold it against the administrator and his creditors, and thus effect a partition of the estate in whole or in part without satisfying the debts of the estate. It would seem to be a safe rule not to permit the heirs to recover property by suit in their own right, unless they make it appear that the administration has been closed, or that the condition of the estate is equivalent to that by showing there is no administrator appointed or acting, *and that there are no debts against the estate.*" (Italics ours.)

From *Peveler vs. Peveler, supra,* we quote the following:

"The appropriation by the administrator of property of the estate, or his failure to settle his accounts and turn over a balance in his hands, would constitute a breach of the bond to the injury of the heirs only in case the property or the balance would be in whole or in part coming to them." * * *

"To show their right to sue, the plaintiffs alleged that there was 'no administration on said estate, the administration of the defendant, L. J. Peveler, having been closed by his removal.' If, however, the evidence showed a pending administration and unsettled claims, then, prima facie at least, it showed that the heirs had no right to sue. The defendants were not driven to plead the nonjoinder of the administrator in abatement. The case was not one of defect of parties who ought to have been coplaintiffs.

But it was one in which the evidence negatived the right of action claimed by plaintiffs."

From the case of *Northcraft vs. Oliver, supra,* we quote as follows:

"The general rule being firmly established that the heirs cannot sue for and recover the property belonging to the estate of a deceased ancestor while an administration is pending, nor where there is no administration, without alleging and proving, if resisted, that there exists no necessity for administration, because there are no debts, necessarily precludes such a recovery by the heirs, as such, from a creditor himself."

From the case of *Herbert vs. Harbert, supra,* we quote:

"In order to entitle the plaintiffs to maintain a suit in this case, it was necessary for them to show an injury to themselves as heirs. If there are creditors whose claims might absorb the estate, the injury is, prima facie at least, to the estate and to the creditors, and not to the heirs. Peveler v. Peveler, 54 Tex. 53; Fort v. Fitts, 66 Tex. 593, 1 S. W. 563; Beddings vs. Steele, 28 Tex. 733; Bufford v. Holliman, 10 Tex. 560; Patton v. Gregory, 21 Tex. 513; Remick v. Luter, 32 Tex. 799; * * * Under this view of the law the court below instructed the jury that, if the estate of Herbert was insolvent, they should find a verdict for the defendant. * * *

"The evidence showed that claims to a very large amount had been established against the estate, and remained unpaid, when Harbert was discharged or removed as administrator. They had not become barred or forfeited. When once a claim is established as valid against an estate it becomes a judgment, and

the statute of limitations does not affect it while the estate is in process of administration. * * * Although many years had elapsed when the order closing the estate was made, the claims established during the administration were still valid and subsisting claims against the estate, and were when the plaintiffs brought their suit, for the payment of which the creditors might have reopened administration through the appointment of an administrator de bonis non, who might have sued the administrator.

"Since this is an original suit in the district court, and not a direct proceeding to review the orders of the probate court, the orders of that court approving the accounts of the administrator are conclusive as to the matters to which they relate, * * * ."

From the above and foregoing it will be seen that the unbroken line of authorities of the State of Texas hold that, based upon the holding of the court that the estate was insolvent and that there were unpaid debts, the heirs could not maintain this suit to impress a trust upon the property, because the effect of such suit is to sue for the property, and that fact would be to the prejudice of the unpaid creditors, who are necessary parties to the suit.

Fifth Proposition.

Under our Fifth Proposition, which was to the effect that the sale of the property in question took place on the application of creditors, was ordered by the probate court and confirmed by the probate court, and one of the creditors of the estate purchased the property and obtained fee simple title thereto, and through the orders of the court effect-

ing the sale, all interest in the property, legal and equitable, was divested out of the estate and became the absolute property of one of the creditors, namely the Southwestern Life Insurance Company. Thereafter, the administration was duly closed, and the administrators were duly and legally discharged. Later, and at a time when there was no trust obligation, to-wit: May 1, 1935, George Strates and J. L. Dimotsis, purchased the property from the insurance Company. And no fraud having been proven by the eivdence before the trial judge, there being no trust obligation because of the discharge of the administrators, no trust could be legally impressed upon the property, the authorities sustaining this Proposition are as follows:

Allen vs. Gillette, 127 U. S. 589, 32 L. Ed. 271;
Erskine vs. De La Baum, 3 Tex. 417;
Howards vs. Davis, 6 Tex. 174;
Scott vs. Mann, 33 Tex. 726;
Goodgame vs. Rushing, 35 Tex. 722;
Griswold vs. Comer, 161 S. W. 423.

We quote the following statement of the law applicable from the case of *Allen vs. Gillette, supra:*

"There is nothing in the transaction, from its inception to its final consummation, that imposed upon the defendant any duty incompatible with his right as a purchaser at the sale.

"The principle that a trustee may purchase the trust property at a judicial sale brought about by a third party, which he had taken no part in procuring, and over which he could not have control, is upheld by numerous decisions of this Court and of other courts of this country. Prevost v. Gratz, 1 Pet. CC.

378; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 Law. Ed. 328; Chorpenning v. Appeal, 32 Pa. 315; Fisk vs. Sarber, 6 Watts & S. 18.

"It is true that the rule upon this subject as stated by some text writers is more stringent than that stated in these cases. 1 Perry Tr. No. 205; Hill, Tr. No. 250. We think, however, that the language employed by them does not present a thorough and perfect generalization of the essential principles pervading the decisions upon this subject. They are in manifest conflict with the uniform current of decisions of the Supreme Court of Texas, which are our guides in this case. Erskine v. De La Baum, 3 Tex. 416; Howards vs. Davis, 6 Tex. 174; Scott v. Mann, 33 Tex. 725; Goodgame v. Rushing, 35 Tex. 722."

Sixth Proposition.

The letter written by J. L. Dimotsis to Mrs. Eugenia Dimotsis, dated May 28, 1935, was wholly insufficient to establish or support the claim of constructive trust, because at the time of the writing of the letter the estate had been legally divested of all title to the property, both legal and equitable, by virtue of the foreclosure sale through the Probate Court to the Southwestern Life Insurance Company, and the estate thereafter had no interest to lose and there was no fiduciary relationship existing between Gorge Strates and J. L. Dimotsis and Mrs. Eugenia Dimotsis. The letter, therefore, was wholly insufficient as evidence of a constructive trust, because there was no consideration whatever therefor.

Authorities.

Gabert vs. Olcott, 86 Tex. 121, 23 S. W. 985;
Ebberts vs. McLean, 98 S. W. (2d) 352 (Sup. Ct.).

We quote the following statement of the law from the case of *Gabert vs. Olcott, supra.*

"A constructive trust is one that arises when a person clothed with some fiduciary character, by fraud or otherwise, gains some advantage to himself. Courts construe this to be an advantage for the cestui que trust, or a constructive trust. * * * There can be no resulting trust, because nothing of value was paid for the conveyance. The plaintiff cannot be held a constructive trustee, because the railroad company had no legal or equitable claim upon the property, to be injuriously affected by the transaction."

From the case of *Ebberts vs. McLean, supra,* we quote:

"It occurs to us that plaintiffs have paid no consideration whatever upon the basis of which a trust, either resulting or constructive could arise * * * ."

Seventh Proposition.

Under this proposition, which is to the effect that it was the duty of the administrators, under the law, to keep the building in controversy in proper repair, and the administrators in doing so should not have been held to have had ulterior or improper motives, such as furtherance of a scheme and desire to obtain the property for their own use and benefit, we cite the authority.

Revised Civil Statutes of Texas, Article 3426, which reads as follows:

"The executor or administrator shall take such care of the property of the estate of his testator or

intestate as a prudent man would take of his own property, and if there be any buildings belonging to the estate, he shall keep the same in tenable repair, extraordinary casualties excepted, unless directed not to do so by an order of the court."

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 182

GEORGE STRATES, INDIVIDUALLY, AND AS ADMINISTRATOR OF THE ESTATE OF J. L. DIMOTSIS, DECEASED, ETC., ET AL., *Petitioners*

VS.

EUGENIA DIMOTSIS, ET AL., *Respondents*

Supplement to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and Supporting Brief

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Statement Under Fourth Proposition, Page 15

The trial court found that the estate of George Dimotsis, deceased, was insolvent at the time of his death. (R. 104-5.) It was stipulated that at the time of the approval of the final account several claims against the estate of George Dimotsis, de-

ceased, aggregating the sum of not less than $11,000.00 were unpaid. (R. 65.) This was in addition to the secured debt amounting to $59,041.39, secured by lien in favor of the Southwestern Life Insurance Company, which lien was foreclosed in satisfaction of said sum, (R. 71); the two sums aggregating $70,041.39. The trial Court found that the property of the estate at the time it was sold under foreclosure had a market value of $70,000.00. (R. 109.) The estate was closed by order of the probate court of Nueces County, Texas, on the 16th day of April, 1935, (R. 65) and the claims for $11,000.00 were unpaid. (R. 65.) The property was sold on application of the mortgage creditor through the probate Court. Ex. "A." (R. 66.) The sale was confirmed by the probate Court. Ex. "B." (R. 71.) The probate Court entered an order approving the signed account and discharging the administrator. (R. 72-3.) The administrators were discharged after the sale of the property to the Southwestern Life Insurance Company. (R. 107.)

Respectfully submitted,

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